JD-25-98
Detroit, Michigan

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

UNITED PARCEL SERVICE

AND

DAVID DUNNING

Case 7-CA-33137
7-CA-33981(2)
7-CA-34605
7-CA-34903

SUPPLEMENTAL DECISION ON REMAND

Judith Ann Dowd, Administrative Law Judge: On November 7, 1997, the Board issued its Order Remanding the above-captioned decision to me for explication of my resolution of certain credibility issues and for an analysis of the Dunning discharge under *Wright Line.*[1]

A. Ruling on Motions

Following issuance of the Order Remanding,[2] Respondent filed a Motion to Reopen the Record to receive the testimony of Jennifer Shroeger and/or to admit into evidence two statements prepared by Shroeger which had been rejected during the hearing. Shroeger was present during the disputed conversation and was the manager who made the determination to discharge Dunning.[3]

At the hearing, Respondent had sought to introduce two memoranda prepared and signed by Shroeger, Respondent's Exhibits 13 and 14. These memoranda purported to memorialize the meeting between Shroeger, William Soumis, the Division manager, and Dunning which preceded Dunning's discharge and a separate conversation between Shroeger and Erin Kelley, the object of Dunning's alleged continued sexual harassment.[4] Counsel for the

[1] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[2] Although dated November 7, 1997, the Board's Executive Secretary has confirmed Respondent's contention that the Order was not served, i.e., deposited in the mail, until November 19, 1997. Thus, Respondent's Motion to Reopen record, which was filed on December 17, 1997, was not untimely. See NLRB Rules, Secs. 102. 48(d)(2) and 102.112.

[3] Counsel for the General Counsel submitted a Response to, and a Motion to Strike Portions of, Respondent's Motion on the basis that Respondent's arguments went to the merits of the issues remanded and improperly referenced evidence not part of the official record, the rejected statements and an affidavit of Shroeger. To the extent that Respondent's arguments go to the merits, they are essentially repetitive of arguments made by Respondent in its initial brief. To the extent that they refer to the rejected exhibits, I note that Counsel for the General Counsel also referred to them in his brief to me. I discern no prejudice to any party arising from consideration of Respondent's Motion and deny the Motion to Strike. I have fully reviewed and considered again the briefs filed by all parties; I find no basis to request or allow additional briefs at this stage of the case.

[4] This latter statement purports to memorialize a conversation between Shroeger and Kelley which apparently took place after Shroeger and Soumis had spoken with Dunning. That statement begins with, "In the evening of December 28 . . ." The record is silent as to the hour

Continued

General Counsel objected and I rejected those memoranda as hearsay, not admissible as within the "business record exception" to the hearsay rule. See FRE, Rule 801 and 803(6). I maintain that ruling herein, noting further that there was nothing in those statements, in Shroeger's absence or in the circumstances under which they were created which would warrant their consideration under the catchall provisions of FRE 803(24). The decision to discharge Dunning was made by Shroeger, allegedly based upon a conversation which she and Soumis had with Dunning, and possibly upon her conversation with Kelley, not by others superior to Shroeger in reliance upon her memoranda concerning those conversations. Thus, the issue was not whether Respondent had a good faith belief that Dunning had engaged in misconduct, based upon those memoranda, but whether what transpired in the meeting and what he allegedly did to Kelley supported Respondent's claim that it had a nondiscriminatory reason for which he would have been terminated even in the absence of any protected activity.[5] Absent the applicability of an exception to the hearsay rule, the testimony of live and present witnesses, subject to cross examination and the judge's evaluation of credibility, is the way to prove facts. Facts are not generally established by affidavit in NLRB proceedings.

In objecting to the admission of RX 13, Counsel for the General Counsel noted that "the company has not demonstrated that Ms. Shroeger is not available to it as a witness." Counsel for Respondent did not assert that she was unavailable but simply brought out that Shroeger, while still employed by Respondent, was working in Atlanta, Georgia rather than in Detroit, Michigan, where the hearing was conducted. Neither did Respondent seek to adjourn the hearing to call Shroeger as its witness. In footnote 9 of my initial Decision, I noted that Respondent had "offered no explanation for its failure to call" Shroeger notwithstanding that it had acknowledged that she was still employed by UPS. Perhaps I could have said that Respondent had "failed to adequately explain or justify Shroeger's absence." The net effect, however, is the same. Respondent did not call a witness whom it could reasonably have anticipated would give testimony favorable to its cause and did not explain why it could not have done so.[6] Such failures warrant the adverse inference which I drew.

Respondent now seeks to have the hearing reopened to adduce the testimony of Jennifer Shroeger. The evidence which she would offer, however, is neither newly discovered nor previously unavailable. Neither is it evidence which was proffered at the hearing and improvidently rejected. Accordingly, under Rule 102.48(d)(1), it does not warrant that this hearing be reopened.

B. Explication of Credibility Resolutions

The events of the December 28, 1992 meeting are critical to a determination of whether Dunning was discriminatorily discharged. On direct examination, Dunning testified that he was in the office, discussing another grievance, when Shroeger raised the issue of his discussing the reasons for his earlier suspension with other employees. At that time, he asserted, she said that she had heard "that [he] was making [his] suspension a topic of locker room conversation."

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when the conversation with Dunning took place but he was a day shift employee, arriving at work between 7:30 and 8:15 a.m.

[5] I note that the reporter improperly included Respondent's Exhibits 13 and 14 in the official record with no notations upon them that they had been rejected. Indeed, the transcript, at Tr. 236, only reflects that RX 13 was rejected; RX 14 is shown as received. These exhibits should have been marked as rejected and they should have been included in a separate rejected exhibit file and then only if such inclusion had been requested.

[6] It is no justification that Respondent had Shroeger's contemporaneously prepared statements available as proposed exhibits. It could not reasonably have anticipated that those statements would be received in evidence in lieu of her testimony.

She also told him, and he denied, that he had been instructed to keep the nature of his suspension (i.e., the sexual harassment of Kelley) confidential and, in the course of that conversation, asked if he was a socialist, connecting his union and TDU (Teamsters for a Democratic Union) activities with that political philosophy. Shroeger and Soumis stated or implied that he was intimidating Kelley and Dunning told them that he was complying with Soumis' earlier instructions to stay away from her. He asked Soumis to similarly keep her away from him. In the course of that conversation, Dunning stated that he "had a right to talk to other members [of the union] about the reasons he was suspended" and that, if he "needed to investigate his suspension," he was allowed as a steward to do so. (Tr. 112-114). There was some intimation, he recalled, that Kelley felt intimidated by his presence in the building and by his functioning as a union steward; he pointed out that his routes through the building and his steward responsibilities precluded total avoidance of her. On cross-examination, Dunning testified that when Shroeger had asked him whether he had consulted an attorney as she had earlier suggested, he told her that, as she knew, he had filed charges with the National Labor Relations Board. Her response, at that time, was that this was "a Federal matter not a labor matter" (Tr. 140-141). At the hearing, he was asked and acknowledged that when other employees asked him why he had been suspended, he had told them that it was "for my union activities and for sexual harassment" (Tr. 113). I credit Dunning's testimony, as set forth herein.

In crediting Dunning's recollection over that of Soumis (as set out *infra* and in the Board's Order Remanding), I rely here, as I expressly did in my initial Decision, on the adverse inference drawn from Respondent's failure to call Schroeger. I also rely upon Dunning's credibly offered denial, when recalled to the stand, that he had ever said or done anything "to impugn Erin Kelley" or that he had said that he *had* conducted an investigation. He had only asserted a right to conduct such an investigation (into the facts of his suspension) if he choose to do so. He also expressly and credibly denied telling Soumis and Shroeger that he was "going to dig up enough dirt on Ms. Kelley to show that she's not the angel they thought she was."(Tr. 478). In concluding, as I did in my Decision, that *"[t]here is no record evidence* to support the allegation that Dunning continued to sexually harass Kelley,'' (internal quotation marks omitted) I was referencing and finding without substance Respondent's first numbered reason for Dunning's discharge as set forth in the January 6 letter, i.e., "1. Continuance of sexual harassment,"[7] not disregarding Soumis' testimony. In this regard, I note the total absence of evidence that Dunning had any offensive contact with Kelley after his suspension. I note, too, Dunning's credible testimony to the effect that, in the grievance hearing with respect to his suspension, both Shroeger and Kelley confirmed that there had been no such contact, that is, no continued sexual harassment, between the suspension and the termination (Tr. 154). That statement also encompassed my conclusion that there was nothing in Dunning's comments to either Shroeger and Soumis or to his fellow employees concerning his suspension which could be deemed continued sexual harassment. I adhere to that conclusion under either Dunning's or Soumis' version of the conversation.

C. *Wright Line* Analysis

Dunning was an active and aggressive union steward. He was active as a dissident Teamster and he had filed an unfair labor practice charge asserting that his earlier suspension was discriminatorily motivated. I found, in my initial decision, that Respondent had violated Section 8(a)(1) by disparately and discriminatorily disciplining Dunning for distributing protected union literature in the check-in and similar areas on non-work time. I also found that Respondent violated Section 8(a)(1) by removing a protected publication which had been

[7] Reasons number 3 and 4, "Retaliation for filing a sexual harassment complaint" and "creating a hostile work environment" are essentially paraphrasings of this same allegation.

posted on the union bulletin board by Dunning because that publication was critical of the Respondent. Dunning's active and open protected activity, Respondent's animus toward such activities as demonstrated by its unfair labor practices, and Shroeger's reference to his union activities in the December 28 meeting, followed by his discharge for comments made in that meeting, are more than sufficient to carry the General Counsel's burden of showing that the protected union activity was a motivating factor in that discharge. *WJJD,* 324 NLRB No. 167, Sl. op. 4-5 (1997); *Manno Electric,* 321 NLRB 278 (1996).

The burden of showing that it would have discharged Dunning even in the absence of his protected activity thus shifts to Respondent. It has failed to carry that burden. The principal reason asserted for the discharge, alleged sexual harassment of Kelley, is, I find, a pretext. There was no sexual harassment following Dunning's suspension. Dunning merely acknowledged that, when asked, he had told other employees that sexual harassment had been one of the reasons for his earlier suspension and he asserted (but had not exercised) the right to gather evidence with respect to his grievance. That an employee has such a right cannot be denied and there is no evidence, probative or otherwise, that Dunning said or did anything to impugn or harass Kelley or otherwise exceeded the bounds of protected activity.[8]

As to Respondent's second arrow, the alleged breach of a confidentiality mandate, I similarly find pretext. The evidence which I have credited fails to indicate that Dunning had been ordered not to talk about the reasons for his suspension. It also fails to establish that, if such an order was given, he breached it.[9] Moreover, I would find that the imposition of any such mandate would, in itself, be an unlawful infringement on Section 7 rights. Management cannot tell employees not to talk about "union stuff." *Louis A. Weiss Memorial Hospital,* 324 NLRB No. 150 Sl. op. 11 (1997). It cannot order employees not to discuss their wages. *Vanguard Tours,* 300 NLRB 250 (1990), enfd. 981 F.2d 62 (2nd Cir. 1992). The discussion of discipline and grievances pertaining thereto is of the same protected nature.

Finally, I would reach the same conclusion even if I were to credit Soumis' recollection of the December 28 meeting as related in the Board's Order Remanding. To wit, that Dunning said:

> it was his responsibility as a union steward to expose Erin for what she really was; that he was interviewing people; and that he was going to prove to us that she was not the sweet angel, or a comment to that effect, that we thought she was; that, in fact, he could prove that she was a homosexual.

This conversation took place in the course of a discussion about the local level hearing to be held on Dunning's grievance over the two-day suspension for having sexually harassed Kelley. As noted above, Dunning was entitled to grieve and to present a defense to that

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[8] Even if Shroeger's memorandum of her December 28 conversation with Kelley were to be admitted into evidence, it establishes neither harassment nor a basis for Respondent to believe that there had been harassment. In that conversation, as Shroeger memorialized it, Kelley purportedly spoke of not being liked anymore, of *feeling* that everyone knew what had happened, of *feeling* that Dunning was "out to get her," of being told of hearsay that another employee had heard that she was gay, of receiving a dirty look from Dunning, and of seeing Dunning in her work area. I also take notice that, other than talking to Kelley, Shroeger apparently engaged in no investigation of Dunning's alleged harassment. The absence of any meaningful investigation tends to negate the assertion of a nondiscriminatory motivation.

[9] Even if he told other employees that he had been suspended for sexual harassment, that statement without more, could not be considered a breach of anyone's reasonable expectations of privacy.

discipline. Sexual harassment whether directed at one who is straight or gay is reprehensible. An accusation of such an offense is serious, and to be found guilty can leave a serious blot on a reputation. Dunning could not be hobbled in mounting a defense by limitations on whether he could seek out and call witnesses. In light of his claims that he and Kelley were friends, that she was open about her sexual orientation, that he had merely been engaging in friendly banter with her in the July incident, that he was surprised when she took umbrage and that he fully and immediately complied with her request to cease making such remarks, there was a reasonable basis for him to seek supporting evidence from other employees (Tr. 168-178). I note that, while Soumis' version has Dunning stating that "he was interviewing people," there was no evidence that Respondent investigated that assertion or determined from any employee that Dunning had made untoward statements about Kelley.

Were I to find the facts to be as Soumis testified, I would find the violations alleged under both a *Wright Line* analysis and also on the principles of *NLRB v. Burnup & Sims,* 379 U.S. 21 (1964) and *Rubin Bros. Footwear, Inc.,* 99 NLRB 610 (1952):

> Where an employee is disciplined for having engaged in misconduct in the course of union activity, the employer's honest belief that the activity was unprotected is not a defense if, in fact, the misconduct did not occur. *Keco Industries,* 306 NLRB 15, 17 (1992).

Thus, if Soumis' testimony were to be credited, Dunning was engaged in protected activity in grieving his suspension and in discussing how he would present his defense. Respondent may have believed that his intended defense would constitute further harassment of Kelley but, in fact, it has not shown that further harassment or other misconduct occurred.

D. Conclusions and Order[10]

The Conclusions of Law and Recommended Order previously stated in my initial Decision are incorporated by reference herein.

Dated, Washington, D.C.

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Judith Ann Dowd
Administrative Law Judge

[10] Exceptions to the foregoing findings and conclusions may be filed as provided by Sec. 102.46 of the Board's Rules and Regulations.